80-1230

NO.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

ESTATE OF O.W. NEWMAN, JR., Deceased,
ADELLE B. NEWMAN and FREIDA N. MILLER,
Co-Executrixes,

Petitioners

v.

COMMISSIONER OF INTERNAL
REVENUE SERVICE,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1.

The substantive issue in this litigation is whether an attempted renunciation or disclaimer of interest in estate property by an heir to said estate is valid as a "disclaimer" within the legal meaning of Internal Revenue Code Section 26-2056(d)(2) as it existed at the date of decedent's death where said attempted renunciation or disclaimer satisfies all of the requisites of both the relevant State statute (as it existed at the time of decedent's death) and of I.R.C. Section 26-2056(d)(2) except that the attempted renunciation or disclaimer was filed too late to meet the time for filing deadlines of the State statute even though said filing was before the deadline of I.R.C. Section 26-2056(d)(2). Any other issues of substance are part and parcel of this question.

2.

In considering this Petition for Writ of Certiorari, this Court will of necessity have to address the additional issue of whether the case of *Keinath v. Commissioner of Internal Revenue*, 480 F.2d 57 (8th Cir. 1973), when viewed vis-a-vis the decision of the Fifth Circuit in the instant case, forms a sufficient basis of conflict between different Circuits so as to provide adequate grounds for the exercise of this Court's discretion in granting a writ of certiorari to the Fifth Circuit Court of Appeals.

Parties to the Proceedings Below

All parties to the proceedings in this case in both the United States Tax Court and the United States Court of Appeals for the Fifth Circuit are included in the caption on this petition.

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IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1980

ESTATE OF O.W. NEWMAN, JR., Deceased,
ADELLE B. NEWMAN and FREIDA N. MILLER,
Co-Executrixes,
Petitioners

v.

COMMISSIONER OF INTERNAL
REVENUE SERVICE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NOW COMES the Estate of O.W. Newman, Jr., Adelle B. Newman and Freida N. Miller, Co-Executrixes (hereinafter "the Estate" or Petitioners"), and file this their Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. Based on the herein set forth facts, grounds, authorities and arguments, said Petitioners respectfully pray that this Court issue a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit in the above-styled case.

OPINIONS BELOW

The Memorandum Opinion rendered June 6, 1979, by the United States Tax Court was not reported in full in the

official Tax Court Reports; however, it is listed by style only at 72 T.C. 1246(1979). Said Memorandum Opinion is unofficially reported in full at Paragraph 79,223 P-H Memo TC (i.e., the Prentice-Hall Tax Court reporter) and is also attached hereto as Appendix "A". The Decision of the United States Tax Court entered June 8, 1979, pursuant to the Memorandum Opinion is unpublished and is attached hereto as Appendix "B".

The July 28, 1980, opinion of the United States Court of Appeals for the Fifth Circuit affirming the Tax Court decision is as yet unpublished in Federal Reporter, Second Series, and is attached hereto as Appendix "C". The Per Curiam opinion of October 23, 1980, by the Fifth Circuit Court of Appeals denying Petitioners' Petition for Panel Rehearing is likewise unpublished as of this date and is attached hereto as Appendix "D". (Petitioners' best information is that these opinions of the Fifth Circuit will not be published by West Publishing Company in Federal Reporter, Second Series.)

JURISDICTION

The judgment of the Court of Appeals below (Appendix "C") was entered on July 28, 1980, after which said Court of Appeals denied Petitioners' Motion for Rehearing via an order entered on October 23, 1980 (Appendix "D"). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The two (2) relevant and applicable statutory provisions involved in this case are as follows:

(1) Internal Revenue Code of 1954, Section 2056(d)(2) (26

U.S.C. Section 2056 (d)(2) as it existed from 1966 to December 31, 1976, i.e., at the time of decedent's death):

> Bequests, etc., to surviving spouse
>
> ***
>
> (d) Disclaimers.
>
> ***
>
> (2) By any other person. If under this section an interest would, in the absence of a disclaimer by any person other than the surviving spouse, be considered as passing from the decedent to such person, and if a disclaimer of such interest is made by such person and as a result of such disclaimer the surviving spouse is entitled to receive such interest, then
>
> (A) if the disclaimer of such interest is made by such person before the date prescribed for the filing of the estate tax return and if such person does not accept such interest before making the disclaimer, such interest shall, for purposes of this section, be considered as passing from the decedent to the surviving spouse, and
>
> (B) if subparagraph (A) does not apply such interest shall, for purposes of this section, be considered as passing, not to the surviving spouse, but to the person who made the disclaimer, in the same manner as if the disclaimer had not been made.

(2) Georgia Code Annotated Section 113-824 (1972 Ga. Laws pp. 452, 453) (as it existed at the time of decedent's death):

> Renunciatin of Successtion
>
> (a) A person . . . who is an heir, devisee, . . . (or) beneficiary under a testamentary instrument . . . may renounce in whole or in part the succession to any property or interest therein by filing a written instrument within the time. . . hereinafter provided . . . .
>
> (b) The writing specified in (a) must be filed within six months after the death of the decedent . . . or if the taker of the property is not then finally ascertained not later than six

months after the event by which the taker or (sic) the interest is finally ascertained . . . .

(c) . . . (t)he interest renounced . . . passes as if the person renouncing had predeceased the decedent . . . .

STATEMENT OF THE CASE

On September 3, 1976, the Internal Revenue Service (the I.R.S.) issued a notice of deficiency to the Estate of O.W. Newman, Jr. (the "Estate"), said deficiency being based on the I.R.S.'s partial disallowance of the Estate's marital deduction as claimed in its Federal Estate Tax Return. The partial disallowance came about because of the I.R.S.'s determination that certain "disclaimers" or "renunciations" of estate property as filed by some of the heirs to the estate we invalid under the applicable federal statute (i.e., 26 U.S.C. § 2056 (d)(2)) as it existed at the time of decedent's death; hereinafter "§ 2056") because said disclaimers were filed after the Georgia time-for-filing statute (Ga. Code. Ann. § 113-824 (b), as it existed at the time of decedent's death), although they were filed (in the proper Georgia Probate Court) *before* the expiration of the deadline for filing as set out in the federal statute. The disclaimers met all other requirements of both the federal and state statutes.

The Estate petitioned the U.S. Tax Court to redetermine the deficiency, basing federal Tax Court jurisdiction on 26 U.S.C. § 6214. After both sides stipulated the facts, the Tax Court upheld the I.R.S.'s original determination of the deficiency, basing its decision on, inter alia, *Estate of Caswell v. Commissioner*, 62

T.C. 51 (1974), which case held that in order to qualify as a valid disclaimer for federal tax purposes, an attempted disclaimer must be valid under state law. (See Appendix "A".)

On appeal to the U.S. Court of Appeals for the Fifth Circuit, the Estate argued that state law does control as to the *substantive* validity of a disclaimer, but that federal law determines whether a disclaimer is *procedurally* valid, i.e., as to the time allowed for filing a disclaimer. Thus, since the disclaimer herein met the federal time for filing requirements, the deficiency should be eradicated. However, the Fifth Circuit agreed with the I.R.S. position and affirmed the Tax Court (Appendix "C") and also denied the Estate's petition for rehearing (Appendix "D".)

ARGUMENT

The basis of this Petition is a conflict between different Circuit Courts of Appeal. Supreme Court Rule 171 (a). The holding of the Fifth Circuit in the instant case is directly in conflict with the rule in the Eighth Circuit Court of Appeals as set forth in *Keinath v. Commissioner of Internal Revenue*, 480 F. 2d 57 (8th Cir. 1973). Although it was a gift tax case, *Keinath* also was concerned with whether or not a disclaimer of a gift was timely filed so as to avoid the federal tax. The Eighth Circuit agreed with the Tax Court's determination that federal, not state standards of timiliness of filing a disclaimer controlled the validity of the disclaimer for federal tax purposes, although the Tax Court decision was reversed on grounds not relevant to the case subjudice.

Although under the then - existing federal gift tax laws, the timiliness standerd was one of reasonability rather than a set period as in the situation herein (compare *Kathryn S. Fuller,* 37 T.C. 147 (1961) with I.R.C. § 2056 (d)(2), in both situations the same rationale should apply. In the interest of uniformity, the federal taxing laws, whether as to estate or gifts, should control the procedural timing of a disclaimer. *Keinath, supra,* 480 F.2d at 61. State law should, in each instance determine only whether the disclaimer was a valid and sufficient refusal to accept, i.e., a substantive matter. In this regard the legislative history of I.R.C. § 2056 should be considered:

> "A disclaimer, for purposes of this bill, . . . must be a valid refusal under state law . .". S. Rept. 1599, 89th Cong., 2d Sess. 5 (1966), U.S. Code, Congressional and Administrative News 3112 at 3116.

Certainly, whether the refusal is valid is substantise. But the timing requirements are procedural. In fact, the only Georgia appellate decision on point so held:

> "We further hold that Georgia Code Ann. § 113-824 (b) (the state time limitation for filing disclaimers) is . . . a *procedural rule.*" *Leathers v. Gilland,* 141 Ga. App. 681 at 684 (4) 234 SE 2d 336 (1977). (Emphasis added.)

The conflict between Circuits is clear and demands resolution by this Court.

CONCLUSION

Logically, the federal time for filing standard should control, as was so held in *Keinath, supra*; otherwise, the express

time limit of I.R.C. § 2056 (d)(2) is meaningless. Therefore, it is submitted that the Eighth Circuit's approach is the correct one, and since it directly conflicts with the view expressed by the Fifth Circuit in the instant case, this Court should grant certiorari herein in order to resolve the conflict and reverse the decision below.

This the 20th day of January, 1981.

Respectfully submitted,
MURPHY, WITCHER & MURPHY

By: _____
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By: _____
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T.C. Memo. 1979-223

UNITED STATES TAX COURT

ESTATE OF O. W. NEWMAN, JR., DECEASED, ADELLE B. NEWMAN AND FREIDA N. MILLER, CO-EXECUTRICES, Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 10523-76 Filed June 6, 1979.

Jack F. Witcher and *Carl W. McPherson*, for the petitioner.

Stanley H. Smith, Jr., for the respondent.

MEMORANDUM OPINION

TANNEWALD, *Judge:* Respondent determined a deficiency of $25,101.12 in petitioner's Federal estate tax. The sole issue for decision is whether purported disclaimers that comply with the requirements of section 2056(d)(2), [1] but are invalid under state law, qualify as disclaimers for purposes of determining the marital deduction.

All of the facts have been stipulated. The stipulation of facts, together with the exhibits attached thereto, is incorporated herein by this reference.

Adelle B. Newman and Freida N. Miller are co-executrices of the estate of Oscar W. Newman, Jr., also known as O.W.

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1 Unless otherwise indicated, all section references are to the Internal Revenue Code of 1954, as amended and in effect at the date of death.

Newman, Jr., deceased (the decedent). At the time of filing the petition herein, they both resided at Waco, Georgia.

The decedent died testate on June 29, 1973, a resident of Haralson County, Georgia. His will was probated in the Court of Ordinary, Haralson County, Georgia, on August 6, 1973, by which time all takers or heirs of his property had been ascertained. The Federal estate tax return for the estate was timely filed with the Internal Revenue Service Center, Chamblee, Georgia.

The decedent's will provided, in relevant part, as follows:

ITEM THREE

> I give, bequeath and devise to my wife, Adelle B. Newman, and my children, Freida N. Miller, Teresa J. Newman, Rebecca G. Newman, and my stepson, Ronald F. Newman, in equal shares, share and share alike, the Note and Security Deed from The Scales Corporation to myself under date of April 25, 1972, in the principal amount of Two Hundred Fifty-Six Thousand Nine Hundred Eighty ($256,980.00) Dollars. In the event there is a default in said Note and Security Deed and it becomes necessary to foreclose same or to take the land back, then I give, bequeath and devise the land described in said deed to my wife, children and stepson, in equal shares, share and share alike.

ITEM FOUR

> All the rest, residue and remainder of my estate, of every kind and character, and wherever located, I give to my beloved wife Adelle B. Newman, in absolute fee simple title.
>
> PROVIDED, that if my said wife is not in

> life at the time of my death, then I give, bequeath and devise all the rest, residue and remainder of my estate to my three childre [sic], Freida N. Miller, Teresa J. Newman and Rebecca G. Newman, and my stepson, Ronald F. Newman, in absolute fee simple title, share and share alike.

On March, 27, 1974, two days before the Federal estate tax return was due to be filed, Freida N. Miller, Rebecca G. Newman, and Ronald F. Newman each executed without consideration a document purporting to be a disclaimer or renunciation of their interests under the decedent's will. At the time of execution, none of them were under any legal disability. These documents were filed with the Court of Ordinary of Haralson County, Georgia, and on March 28, 1974, an order was entered by the court approving the disclaimers. However, the parties have stipulated that such order was erroneous and that such "disclaimers" were invalid and ineffective under Georgia law because they were not filed within six months of the decedent's death or within six months after the ascertainment of the taker of the disclaimed property as required by Georgia law. See Ga. Code Ann. sec. 113-824 (1975). [2]

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[2] 113-824 Renunciation of succession

(a) A person (or his personal representative) who is an heir, devisee, person succeeding to a renounced interest, beneficiary under a testamentary instrument or person designated to take pursuant to a power of appointment exercised by a testamentary instrument may renounce in whole or in part the succession to any property or interest therein by filing a written instrument within the time and at the place hereinafter provided. The instrument shall (1) describe the property or part

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Footnote 2 continued --
thereof or interest therein renounced, (2) be signed by the person renouncing and (3) declare the renunciation and the extent thereof.

(b) The writing specified in (a) must be filed *within six months after the death of the decedent* or the donee of the power, *or if the taker of the property is not then finally ascertained not later than six months after the event by which the taker of the interest is finally ascertained.* The writing must be filed in the court of the county where proceedings concerning the decedent's estate are pending, or where they would be pending if commenced. A copy of the writing also shall be mailed to the personal representative of the decedent.

(c) Unless the decedent or donee of the power has otherwise indicated by his will, the interest renounced, and any future interest which is to take effect in possession or enjoyment at or after the termination of the interest renounced, passes as if the person renouncing had predeceased the decedent, or if the person renouncing is one designated to take pursuant to a power of appointment exercised by a testamentary instrument, as if the person renouncing had predeceased the donee of the power. In every case the renunciation relates back for all purposes to the date of death of the decedent or the donee, as the case may be.

(d) Any (1) assignment, conveyance, encumbrance, pledge or transfer of property therein or any contract therefor, (2) written waiver of the right to renounce or any acceptance of property by an heir, devisee, person succeeding to a renounced interest, beneficiary or person designated to take pursuant to a power of appointment exercised by testamentary instrument, or (3) sale or other disposition of property pursuant to judicial process, made before the expiration of the period in which he is permitted to renounce, bars the right to renounce as to the property.

(e) The right to renounce granted by this section exists irrespective of any limitation on the interest of the person renouncing in the nature of a spendthrift provision or similar restriction.

(f) This section does not abridge the right of any person

Petitioner argues that the "disclaimers" are nevertheless effective for the purpose of determining the property that passed to decedent's wife and of computing the marital deduction for the Federal estate tax because they comply with the requirements of section 2056(d)(2)(A). [3] Respondent contends

---

Footnote 2 continued --
to assign, convey, release, or renounce any property arising under any other section of this Code or other statute.

(g) Any interest in property which exists on the effective date of this section, but which has not then become indefeasibly fixed both in quality and quantity, or the taker of which has not then become finally ascertained, may be renounced after the effective date of this section as provided herein. An interest which has arisen prior to the effective date of this section in any person other than the person renouncing is not destroyed or diminished by any action of the person renouncing taken under this section. (Acts 1972, pp. 452, 453.) [Emphasis added.]

[3] Section 2056(d)(2), which was deleted by section 2009 (b)(4)(D), Tax Reform Act of 1976, Pub. L. 94-455, 90 Stat. 1520, 1894, provided as follows:

SEC. 2056. BEQUESTS, ETC., TO SURVIVING SPOUSE

* * *

(d) Disclaimers. --

* * *

(2) By any other person.-- If under this section an interest would, in the absence of a disclaimer by any person other than the surviving spouse, be considered as passing from the decedent to such person, and if a disclaimer of such interest is made by such person and as a result of such disclaimer the surviving spouse is entitled to receive such interest, then --

(A) if the disclaimer of such interest is made by such person before the date prescribed for the

that the disposition of this case is controlled by our holding in *Estate of Caswell v. Commissioner,* 62 T.C. 51 (1974), that disclaimers must be valid under local law in order to be effective for purposes of section 2056(d). We agree with respondent.

Petitioner attempts to distinguish *Estate of Caswell v. Commissioner, supra,* on the ground that the purported disclaimers in that case did not meet the requirements of section 2056(d)(2) and argues that this fact, rather than the fact that they were invalid under state law, was the foundation of our holding. In *Caswell,* heirs of the decedent had first transferred their property interests to the surviving spouse by deed and subsequently had filed renunciations with the appropriate state court. Admittedly, we found it unnecessary to determine whether the renunciations were valid under state law because they were not filed within the time limits prescribed by section 2056(d)(2). 62 T.C. at 58. However, our decision that the deed did not qualify as a disclaimer, as the taxpayer contended, was clearly premised on our holding that a disclaimer must be valid

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Footnote 3 continued --

> filing of the estate tax return and if such person does not accept such interest before making the disclaimer, such interest shall, for purposes of this section, be considered as passing from the decedent to the surviving spouse, and
>
> (B) if subparagraph (A) does not apply, such interest shall, for purposes of this section, be considered as passing, not to the surviving spouse, but to the person who made the disclaimer, in the same manner as if the disclaimer had not been made.

under state law in order to qualify under section 2056(d)(2). 62 T.C. at 55-56.

Petitioner emphasizes that neither the statute nor respondent's regulations expressly require that a disclaimer be valid under state law to be effective and infers from this silence that Congress did not intend to impose such a requirement. Although petitioner is right that the statute is silent, Congress' intent that a disclaimer must be valid under state law is unequivocally expressed in the legislative history of section 2056(d)(2). H. Rept. 1513, to accompany H.R. 483 (Pub. L. 89-621), 89th Cong., 2d Sess. 4 (1966); S. Rept. 1599, 89th Cong., 2d Sess. 5 (1966), 1966-2 C.B. 798, 801. For a discussion of the legislative history, see *Estate of Caswell v. Commissioner, supra.* We find no support for petitioner's claim that references in the Senate and House reports indicate only that initial drafts of the bill contained language that required disclaimers be valid under state law. To the contrary, neither the House nor Senate version, to which the committee reports refer, contained such language. See H.R. 483, 89th Cong., 1st Sess., as introduced on January 4, 1965, as reported by the House Ways and Means Committee on May 10, 1966, as passed by the House on August 11, 1966, as introduced in the Senate on August 12, 1966, as reported to the Senate on September 13, 1966, and as passed by the Senate on September 15, 1966. See also H. Rept. 1513, *supra* at 1-2; S. Rept. 1563, *supra* at 1-2, 1966-2 C.B. 798-799.

None of petitioner's remaining arguments justify our de-

viating from or reconsidering our holding in *Caswell.* Petitioner's argument that the Georgia legislature did not intend to affect Federal taxation when it enacted a statute governing disclaimers misses the point. The question here is not what the Georgia legislature intended but, rather, what the United States Congress intended. Cf. *Commissioner v. Estate of Bosch,* 387 U.S. 456, 463 (1967).

The argument that a holding for respondent herein will imply that a valid disclaimer could not be made in Georgia prior to 1972, because there was no statute governing disclaimers, is also without merit. Where an issue before a Federal court is governed by state law, the Federal court applies what it determines to be that law. See *Commissioner v. Estate of Bosch, supra* at 465. If the state has no pertinent statute or case law on the question, then the Federal court determines what rule of law the state courts would adopt if presented with the question. *Doetsch v. Doetsch,* 312 F.2d 323, 327-328 (7th Cir. 1963). See also *Risher v. United States,* 465 F.2d 1,4 (5th Cir. 1972); *Gordon v. Commissioner,* 70 T.C. 525, 531 (1978).

Petitioner also relies on the fact that section 2518 provides a Federal definition of disclaimer, effective for disclaimers made after December 31, 1976, as evidence that this was the Congressional intent in enacting section 2056(d)(2). (See footnote 3, *supra.*) The opinion of a later Congress on the meaning of a statute enacted by an earlier Congress, although accorded some consideration, is not controlling. *Estate of Stoll v. Commissioner,* 38 T.C. 223, 247 (1962). However, even

apart from this rule of statutory construction, the legislative history of the Tax Reform Act of 1976 is not helpful to petitioner because it indicates that Congress believed that the law, prior to its amendment in 1976, required disclaimers to be valid under state law. See H. Rept. 94-1380 66 (1976), 1976-3 (Vol. 3) C.B. 735,800.

Finally, we think that petitioner has failed to recognize the basic issue involved in this case. The "renunciation of succession" provisions contained in section 113-824 of the Georgia Code (footnote 2, *supra*) do more than establish a time sequence for the filing of the appropriate document; they deal in substantive terms with the devolution of property interests upon death. For purposes of the estate tax, the issue of what legal rights and interests are created is determined under state law. *Morgan v. Commissioner,* 309 U.S. 78, 80 (1940); *Aldrich v. United States,* 346 F.2d 37 (5th Cir. 1965); *Estate of Hoenig v. Commissioner,* 66 T.C. 471, 477 (1976). It is clear to us that, when section 113-824 of the Georgia Code is applied in light of the stipulation of the parties that the order of the Georgia court was erroneous and the "disclaimers" of the three children were "invalid and ineffective," no legal right or interest passed to the widow, at least insofar as qualification for the marital deduction herein is concerned.

In view of the foregoing,

Decision will be entered for the respondent.

B-1

UNITED STATES TAX COURT

WASHINGTON

ESTATE OF O.W. NEWMAN, JR., DECEASED, ADELLE B. NEWMAN AND FREIDA N. MILLER, CO–EXECUTRICES,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Opinion, filed June 6, 1979, it is

ORDERED and DECIDED: That there is a deficiency in estate tax in the amount of $25,101.12.

/S/ THEODORE TANNEWALD, JR

Judge

Entered: June 8, 1979

C-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-3255
Summary Calendar*

ESTATE OF O.W. NEWMAN, JR.,
Deceased, ADELLE B. NEWMAN and
FREIDA N. MILLER, Co-Executrixes,

Petitioners-Appellants,

versus

COMMISSIONER OF INTERNAL
REVENUE SERVICE,

Respondent–Appellee.

Appeal from the Decision of the
United States Tax Court

(JULY 28, 1980)

Before HILL, GARZA and THOMAS A. CLARK, Circuit Judges.

THOMAS A. CLARK, Circuit Judge:

Section 2056 of the Internal Revenue Code allows as a deduction from the gross estate, for purposes of computing the estate tax, an amount equal to the value of any interest in property passing from the decedent to the surviving spouse, limited to the greater of $250,000 or 50% of the value of the adjusted gross estate. 26 U.S.C. § 2056(a)(c)(1)(A). From 1966 to 1976, subsection (d)(2)(A) of § 2056 provided that if a third party re-

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* Fed. R. App. Proc. 34(a), 5th Cir. Local R. 18.

ceiving an interest in property from the decedent disclaimed that interest, and as a result of that disclaimer the surviving spouse was entitled to receive that interest, then the interest would be treated, for estate tax purposes, as if it passed directly from the decedent to the surviving spouse, thus augmenting the marital deduction. [1] The decedent, Oscar W. Newman, Jr., died testate on June 29, 1973, a resident of Haralson County, Georgia. The issue on this appeal is the effect on the allowable marital deduction of the failure of takers under Mr. Newman's will to file their disclaimers within the time required by Georgia law. [2]

The facts are not in dispute. Mr. Newman's will provided in part as follows:

---

1 [Former] § 2056. Bequests, etc., to surviving spouse

. . . .

(d) Disclaimers.

. . . .

(2) By any other person. If under this section an interest would, in the absence of a disclaimer by any person other than the surviving spouse, be considered as passing from the decedent to such person, and if a disclaimer of such interest is made by such person and as a result of such disclaimer the surviving spouse is entitled to receive such interest, then

(A) if the disclaimer of such interest is made by such person before the date prescribed for the filing of the estate tax return and if such person does not accept such interest before making the disclaimer, such interest shall, for purposes of this section, be considered as passing from the decedent to the surviving spouse, and

(B) if subparagraph (A) does not apply, such interest shall, for purposes of this section, be considered as passing, not to the surviving spouse, but to the person who made

ITEM THREE

I give, bequeath and devise to my wife, Adelle B. Newman, and my children, Freida N. Miller, Teresa J. Newman, Rebecca G. Newman, and my stepson, Ronald F. Newman, in equal shares, share and share alike, the Note and Security Deed from The Scales Corporation to myself under date of April 25, 1972, in the principal amount of Two Hundred Fifty-Six Thousand Nine Hundred Eighty ($256,980.00) Dollars. In the event there is a default in said Note and Security Deed and it becomes necessary to foreclose same or to take the land back, then I give, bequeath and devise the land described in said deed to my wife, children and stepson, in equal shares, share and share alike.

Footnote 1 continued --
the disclaimer, in the same manner as if the disclaimer had not been made.

2 Ga. Code Ann. § 113-824 provides in part:

(a) A person . . . who is an heir, devisee,. . . [or] beneficiary under a testamentary instrument . . . may renounce in whole or in part the succession to any property or interest therein by filing a written instrument within the time . . . hereinafter provided . . . .

(b) The writing specified in (a) must be filed within six months after the death of the decedent . . . or if the taker of the property is not then finally ascertained not later than six months after the event by which the taker or [sic] the interest is finally ascertained . . . .

(c) . . . [T]he interest renounced . . . passes as if the person renouncing had predeceased the decedent. . . .

ITEM FOUR

All the rest, residue and remainder of my estate, of every kind and character, and wherever located, I give to my beloved wife, Adelle B. Newman, in absolute fee simple title.

On March 27, 1974, two days before the estate tax return was due to be filed, and hence within the time required by 26 U.S.C. § 2056(d)(2)(A), *supra* note 1, Freida, Rebecca, and Ronald each executed without consideration a document disclaiming their legacy under Item Three of the will. If these disclaimers were to be given effect they would increase Mrs. Newman's share under Item Three of the will from 20% to 50%, and the amount of the marital deduction to which the Estate would be entitled would be increased by a corresponding amount. Although filed within the time required by former § 2056(d), these disclaimers were not filed within the time required by Ga. Code Ann. § 113-824(b), *supra* note 2. That section provides that a renunciation of succession "*must* be filed . . . not later than six months after the event by which the taker [of] the interest is finally ascertained." (Emphasis added.) The parties stipulated that all takers were finally ascertained on August 6, 1973, the date that Mr. Newman's will was admitted into probate, fully seven months and three weeks before the execution of the disclaimers.

The appellee-Commissioner of Internal Revenue determined that these disclaimers were ineffective for purposes of computing the marital deduction and determined a deficien-

cy of $25,101.12. The estate then brought these proceedings in the Tax Court below, seeking a redetermination of the tax due. The Tax Court, Tannenwald, J., affirmed the determination of the Commissioner. 1979 T.C.M. (P-H) ¶ 79,223. The Estate seeks review. We affirm.

The position of the Estate before the Tax Court was somewhat inconsistent with its position on appeal. Before the Tax Court the parties had stipulated that the order of the Haralson County Court of Ordinary, approving the disclaimers, was "erroneous, and such disclaimers are invalid and ineffective under Georgia law." R., 48. The Estate-petitioners' position was "that the disclaimers are, however, valid under federal law and valid for federal estate tax purposes. The respondent [Commissioner]'s position is to the contrary." The Tax Court concluded, correctly in our view, that, as a matter of federal law, although the only time limit expressly provided for in § 2056 was that disclaimers be "made . . . before the date prescribed for the filing of the estate tax returns," a condition satisfied here, nonetheless the disclaimer contemplated by that section (for which no express definition was provided) "must be valid under local law in order to be effective for purposes of § 2056(d)." R., 98. *See Estate of C. Warren Caswell v. Commissioner,* 62 T.C. 51. The Senate Report approving the bill which became former § 2056(d)(2) spelled out just what was meant by a "disclaimer": "A disclaimer, for purposes of this bill, is a complete and unqualified refusal to accept some or all of the rights to which one is entitled. *It must be a valid refusal under*

State law and be made without consideration." S. Rep. No. 1599, 89th Cong., 2d Sess., *reprinted in* [1966] U.S. Code Cong. & Ad. News 3112, 3116 (emphasis added). In addition,

> [i]t is not material for this purpose whether a particular State law uses the term "disclaimer" or uses another term describing the same legal effect [as, e.g., "renunciation of succession," Ga. Code Ann. § 113-824]. All that is necessary to qualify under the bill is a refusal, made without consideration, *which is valid under state law* and by reason of which the interest "disclaimed" is received by the surviving spouse *either by operation of law or other provision made by the decedent.*

Id., n. 2 (emphasis added).

Appellant now concedes that the disclaimers in question must be valid under Georgia law in order to qualify under former § 2056(d)(2). Nevertheless, the Estate argues that the failure to comply with the Georgia time limit in executing these disclaimers does not affect their "substantive" validity under Georgia law, but was instead a mere failure to comply with the "procedure" established by state law for effecting a renunciation of succession. [3] In support of its position, the Estate points to *Leathers v. Gilland,* 141 Ga.App. 681, 234 S.E.2d 336 (1977), which to our knowledge is the only Georgia appellate decision construing § 113-824, in which the Georgia Court of

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3 It does not appear that the Tax Court had benefit of this argument.

Appeals drew the substance-procedure distinction in saving a disclaimer that had been filed one day after the expiration of the six-month period provided for in § 113-824(b).

Leathers is no help to the Estate. There the Georgia Court of Appeals had to decide when the six months period in § 824(b) ended. In that case, as it happened, the six months ended on a Sunday, when the disclaimer (which had been executed the previous Friday) could not be filed. It was filed promptly on Monday. The basis for the Court of Appeals' conclusion that the disclaimer was timely filed was Rule 6(a) of the Georgia Civil Practice Act, Ga. Code Ann. § 81A-106(a), which provided in part that, "[i]n computing any period of time prescribed. . . by an applicable statute, . . . [t]he last day of the period so computed shall be included, unless it is . . . a Sunday, . . . in which event the period runs until the end of the next day . . . ." The court distinguished *Davis v. United States Fidelity & Guaranty Company*, 119 Ga. App. 374, 167 S.E.2d 214, in which it had earlier held that CPA Rule 6(a) was "not intended to modify and change existing statutes of limitation," on the ground that § 113-824(b) was "not a statute of limitation but rather a procedural rule." 234 S.E.2d 337. As such, CPA Rule 6(a), enacted by the same authority that authored § 113-824(b), controlled in determining the precise expiration date of the time for renouncing. Nothing in the Civil Practice Act, however, keeps open the time prescribed by § 113-824(b) for the month and three weeks in excess of six months by which time these disclaimers were filed.

Where an issue before a federal court is governed by state law, as here the effectiveness of a disclaimer under § 113-824, we are bound to apply that law as we ascertain it would be determined by the highest court of that state, giving appropriate weight to the decisions of any lesser state courts. *See Commissioner v. Estate of Bosch,* 387 U.S. 456, 465, 87 S.Ct. 1776, 1782-83 (1967). We are compelled to conclude that Georgia law does not recognize the validity of these disclaimers as such. The Georgia General Assembly has prescribed the procedure to be followed in order to take advantage of the estate shifting potential in former § 2056(d), and that procedure requires that a sufficient writing *"must* be filed *within six months"* of the ascertainment of all takers under a will, *supra* note 2 (emphasis added). Whatever the status of these bequests under Georgia law in light of the attempted disclaimers, compliance with the terms of § § 824(a) and (b), governing the sufficiency of the disclaimer and the time and place of filing, is the exclusive condition for treatment under 824(c) as passing the interest disclaimed "as if the person renouncing had predeceased the decedent. . . ." Any other transfer of these interests by these beneficiaries is not a transfer "by operation of law or other provision made by the decedent," S.Rep. No. 1599, *supra,* at n. 2 therein, and hence is not the disclaimer contemplated by former § 2056(d)(2).

The decision of the Tax Court is therefore AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-3255

ESTATE OF O.W. NEWMAN, JR.,
Deceased, ADELL NEWMAN,
and FREIDA N. MILLER,
Co-Executrices,

Petitioners-Appellants,

versus

COMMISSIONER OF INTERNAL
REVENUE SERVICE,

Respondent-Appellee.

Appeal from the decision of the United States
Tax Court

ON PETITION FOR REHEARING

(OCTOBER 23, 1980)

Before HILL, GARZA and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

It was the possibility of takers assuming an inconsistent position before the Federal Estate Tax Collector, on the one hand, and the state court of ordinary, on the other, that was behind the insistence of the drafters of former § 2056 that a disclaimer, to be effective for federal estate shifting purposes, must be "valid" under state law. It's of no consequence, therefore, how one might characterize a condition that state law imposes for the validity of a renunciation of succession, whether it be regarded as either "procedural" or "substantive." If an

attempted disclaimer is so vulnerable to an attack that it cannot be maintained in state court, it cannot be relied upon to shift the estate in this case.

The Estate has given us no reason to think that the disclaimers in this case could survive an action to set aside at some later date in state court. Since we are aware of none, the petition for rehearing is DENIED.